PHANG CHEE YONG & ANOR.

v.

KHO KWANG CHOON

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[CIVIL SUIT NO. K 244 OF 1980]
28 NOVEMBER 1981

LAND LAW: *Agreement of sale of land right to specific performance or rescission - Whether statute barred - Items 90, 91, 94 of Schedule of the Limitation Ordinance (Cap. 49).*

In the action, the plaintiffs claimed the following reliefs:

(a) specific performance of a contract, partly in writing and partly orally for the sale and purchase of 8/10th undivided share in land in Kuching, Sarawak.

(b) further or alternatively, damages for breach of contract;

(c) alternatively, rescission of the contract and repayment to the plaintiffs of the deposit of RM18,000 with interest.

The defendant pleaded, *inter alia,* that:

(a) Since the balance of the purchase price was not paid by the plaintiffs on due date, it was the plaintiffs who were in breach of the contract.

(b) Alternatively, that the claims of the plaintiffs were statute barred by virtue of items 90, 91 and 94 of the Schedule of the Limitation Ordinance (Cap. 49).

The defendant also counter-claimed against the plaintiffs but by consent, it was agreed that the defence of limitation be tried as a preliminary point of law.

The defendant was the registered owner of the land in dispute. The land had been charged to one Phuman Singh and Tan Hua Cho. The latter obtained a Court order to sell the charged land by way of public auction. But to prevent sale by public action, the defendant on 8 December 1980 entered into a written agreement to sell 8/10th undivided share of the land to the plaintiffs for RM120,720 to be free from all incumbrances and with vacant possession. A deposit of RM12,000 was paid and money used to settle the sum owed to Tan. As a result, the charge in favour of Tan was duly discharged.

The balance of the purchase price of RM108,720 after deducting the total amount owing to all the chargees of the land was to be paid within 6 months of the date of agreement of sale, whereupon the defendant was to execute a memorandum of transfer of the land to the plaintiffs. The 6 month period expired on 8 June 1971 and time was the essence of the contract.

On the balance of the purchase price not being paid, on due date, a supplementary agreement was executed by the parties on 18 June 1971 extending the time of payment to 7 February 1972. Under the agreement, the plaintiffs paid to the defendant a further sum of RM6,000 and also agreed to reimburse the defendants interest for a period of 8 months.

As to the question why the balance was not paid on 8 June 1981 the defendant contended that was because the plaintiffs could not raise the money to pay it, while the plaintiffs contended that it was not paid because the defendant and his chargee could not agree as to the exact sum payable.

Held:

[1] The default in not paying the balance of the purchase price on 8 June 1971 was committed by the plaintiffs. The payment was not made because the plaintiffs were unable to raise the money.

[2] There was no other collateral agreement, apart from the supplementary agreement of 18 June 1971 entered into by the parties. By 7 February 1972 neither party was keen to proceed further in the matter and the whole transaction was left in abeyance.

[3] Since the plaintiffs took out the writ against the defendant more than 8 years after 8 February 1972 the suit was brought plainly out of time.

Under items 90 and 91 of the Schedule of the Limitation Ordinance (Cap. 49) the period provided for specific performance and rescission respectively was 3 years. Under item 94, the period fixed for compensation for the breach of a contract in writing is 6 years. Time would be deemed to run from 8 February 1972, the time of performance by the plaintiffs, since time was essence of the contract. As the defendant has expressly pleaded limitation as a defence, the Court had no alternative but to dismiss the suit under s. 3 of the Limitation Ordinance (Cap. 49).

[4] The counterclaim will not be dealt with since the hearing was limited to preliminary point of law. Unless agreement was reached by the parties regarding the counterclaim, a date will be fixed for its determination.

[Suit dismissed. Costs of proceedings reserved to a later date.]

Legislation referred to:

Limitation Ordinance (Cap 49) (Sarawak), s. 3

For the plaintiffs - Chew Pok Oi
For the defendants - Lo Ming

(Digest Form Only)

Also found at [1982] 2 CLJ 124